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SERVICE DATE - NOVEMBER 18, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-847 (Sub-No. 1X)

TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION–DISCONTINUANCE  
EXEMPTION–IN STARKE AND PULASKI COUNTIES, IN

STB Docket No. AB-856 (Sub-No. 1X)

J.K. LINE, INC.–ABANDONMENT EXEMPTION–IN STARKE AND PULASKI  
COUNTIES, IN

Decided: November 12, 2003

By petition filed on July 31, 2003,<sup>1</sup> Toledo, Peoria & Western Railway Corporation (TP&W) and J.K. Line, Inc. (J.K.) (collectively, petitioners), jointly seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for J.K. to abandon, and for TP&W to discontinue service over, a 17-mile line of railroad between milepost 199, near North Judson, and milepost 183, near Monterey, at the end of the line, in Starke and Pulaski Counties, IN. The line constitutes J.K.'s entire line of railroad. A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by Hoosier Valley Railroad Museum, Inc. (Hoosier). The exemption will be granted, subject to environmental, public use, trail use, and standard employee protective conditions.

BACKGROUND

The line was acquired by J.K. from Tippecanoe Railroad Company.<sup>2</sup> Petitioners state that the only shipper on the line, Cargill, has stopped using the line and has closed its facilities, and does not

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<sup>1</sup> Notice of the filing was served and published in the Federal Register on August 20, 2003 (68 FR 50214-15).

<sup>2</sup> See J.K. Line, Inc.–Acquisition and Operation Exemption–Line of Tippecanoe Railroad Company, Finance Docket No. 31625 (ICC served Apr. 24, 1990). TP&W, an indirect subsidiary of RailAmerica, Inc., acquired J.K., a subsidiary of Cargill Incorporated (Cargill), in RailAmerica, Inc., et al.–Control and Merger Exemption–A&R Line, Inc., and J.K. Line, Inc., STB Finance Docket No. 34269 (STB served Dec. 12, 2002).

oppose the abandonment and discontinuance of service. Before the closure of Cargill's grain elevator in Monterey, TP&W transported for Cargill 761 carloads of soybeans and corn in 2001, 463 carloads in 2002, and no cars in the year 2003. The last service on the line occurred on April 1, 2002.

Petitioners claim that the abandonment and discontinuance will eliminate about \$85,000 in annual maintenance costs and allow the sale or reuse of \$550,000 worth of rail, crossties and other track materials between milepost 197.0 and milepost 183.0, and between milepost 198.0 and milepost 197.0. Petitioners plan to transfer the remaining assets to a trail user.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned or service discontinued without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving petitioners of the expense of owning and maintaining a line that is no longer used [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because there are no active shippers on the line. The only former shipper, Cargill, recently closed its facility. Nevertheless, to ensure that the former shipper is informed of the Board's action, petitioners will be required to serve a copy of this decision and notice on Cargill within 5 days of the service date and certify to the Board that it has done so. Given the market power finding, it is not necessary to determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board's exemption authority may not be used to relieve a carrier of its statutory obligation to protect the interests of its employees. In STB Docket No. AB-856 (Sub-No. 1X), J.K. is proposing to abandon a line that constitutes its entire rail system. When issuing abandonment authority for railroad lines that constitute the carrier's entire system, the Board does not normally impose employee protective conditions unless the evidence shows the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Wellsville, Addison & Galetton R. Corp.—Abandonment, 354 I.C.C. 744

(1978); and Northampton and Bath R. Co.—Abandonment, 354 I.C.C. 784 (1978) (Northampton). J.K. has no employees and all of its railroad functions are performed by TP&W. No J.K. affiliate will continue these or similar rail operations. Thus, J.K. does not appear to have any corporate affiliate or parent for which the proposed abandonment could yield a benefit to a rail operation above relief from deficit operations. Furthermore, there has been no showing that the situation under Northampton for imposing employee protection in entire line abandonment cases exists in this case. Under the circumstances, employee protective conditions will not be imposed on J.K.'s abandonment. However, with respect to TP&W's discontinuance of service in STB Docket No. AB-847 (Sub-No. 1X), the interests of railroad employees will be protected by the conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

Petitioners have submitted a combined environmental and historic report with their petition and have notified the appropriate Federal, state, and local government agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on September 29, 2003, and requested comments by October 29, 2003.

In the EA, SEA recommended that conditions be imposed on any decision granting abandonment authority. The first condition recommended by SEA addresses the concerns of the U.S. Environmental Protection Agency (EPA), Region 5, regarding the removal and salvage methods to be used during the final disposition of crossties preserved with creosote, the procedures to be used for storing, fueling, and the prevention of spills from construction equipment, and soil erosion and stormwater runoff mitigation practices that would be used during salvage activities. Accordingly, SEA recommended that petitioners consult with EPA, Region 5, before conducting any salvage activities on this project. The second condition recommended by SEA addresses the concerns of the Indiana Department of Environmental Management (IDEM), regarding water and biotic quality, air quality, potential right-of-way contamination, and permitting requirements. Therefore, SEA recommended that a condition be imposed requiring petitioners to consult with IDEM before conducting any salvage activities on this project. The third condition recommended by SEA addresses the concerns of the Indiana State Historic Preservation Officer (SHPO) that there may be properties and structures on the line that are potentially eligible for inclusion in the National Register of Historic Places (NRHP). Because the SHPO had not completed its evaluation of the effect of the abandonment on potential historical properties, SEA recommended that a condition be imposed requiring petitioners to consult with the SHPO and for J.K. to retain its interest in and take no steps to alter the historic integrity of the line and rail related structures on the right-of-way until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

In a letter dated October 20, 2003, the SHPO states that there will not be any alterations to the characteristics of the properties identified on the line that would qualify them for inclusion in or eligibility for the NRHP. In light of this, SEA now recommends that the section 106 historic preservation condition not be imposed. No other comments were received in response to the EA. Accordingly, the conditions recommended by SEA in the EA, with the exception of the section 106 historic preservation condition, will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As indicated, Hoosier filed a request for issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and a request for a public use condition under 49 U.S.C. 10905. Hoosier submitted a statement of willingness to assume financial responsibility for the right-of-way, and acknowledged that use of the right-of-way is subject to possible future reconstruction and reactivation for rail service as required under 49 CFR 1152.29. By letter filed on August 12, 2003, J.K. states that it is willing to negotiate with Hoosier. Because Hoosier's request complies with the requirements of 49 CFR 1152.29 and J.K. is willing to enter into negotiations, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, J.K. may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in the EA that the right-of-way may be suitable for other public use following abandonment. Hoosier also requests that a 180-day public use condition be imposed on the line to give it time to coordinate the efforts of local interest groups and to negotiate to acquire the right-of-way for use as a trail. Hoosier requests that J.K. be prohibited from: (1) disposing of the rail corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels.

The Board has determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. Hoosier has met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the right-of-way to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, J.K. must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. A public use condition is not imposed for the benefit of any one potential

purchaser. Rather, it provides an opportunity for any interested person to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, J.K. is not required to deal exclusively with Hoosier, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. An offer of financial assistance (OFA) to acquire a rail line for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use.<sup>3</sup> Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903 for the abandonment by J.K. of, and discontinuance of service by TP&W over, the above-described line is granted, subject, in STB Docket No. AB-847 (Sub-No. 1X), to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject, in STB Docket No. AB-856 (Sub-No. 1X), to the conditions that J.K. shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (but not track and track materials) for a period of 180 days from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use; (2) consult with the EPA, Region 5, before conducting any salvage activities on this project; (3) consult with IDEM before commencement of any salvage activities on this project; and (4) comply with the terms and conditions for implementing interim trail use/rail banking as set forth below.

2. Petitioners are directed to serve a copy of this decision and notice on Cargill within 5 days after the service date of this decision and notice and to certify to the Board that they have done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the

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<sup>3</sup> See Trails, 2 I.C.C.2d at 608.

railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, J.K. may fully abandon the line, provided the conditions imposed above have been met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroads and the Board by November 28, 2003, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

9. Provided no OFA has been received, this exemption will be effective on December 18, 2003. Petitions to stay must be filed by December 3, 2003, and petitions to reopen must be filed by December 15, 2003.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), J.K. shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by J.K.'s filing of a notice of consummation by November 18, 2004, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of

the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary